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No. __-____

IN THE

Supreme Court of the United States

CHRISTOPHER ARTUZ, Superintendent,
Greenhaven Correctional Facility,

Petitioner,

—v.—

TONY BRUCE BENNETT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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January 24, 2000

QUESTION PRESENTED

Is a state court post-conviction application "properly filed" within the meaning of 28 U.S.C. § 2244(d)(2), which tolls the one-year statute of limitations for habeas corpus petitions in the Anti-Terrorism and Effective Death Penalty Act of 1996, if it is filed in a court that does not have the power to hear the merits of the application?

TABLE OF CONTENTS

Page No.

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

- Crime And Trial 4
- Direct Appeal 5
- Post-Conviction Applications 6
- Federal District Court Proceedings 7
- Second Circuit Decision on Appeal 8

REASONS FOR GRANTING THE WRIT 9

- Summary of Argument 9

I. There Is A Split Of Authority Among The Circuits Concerning What Constitutes A "Properly Filed" State Post-Conviction Application Sufficient To Toll The Statute Of Limitations Under The Anti-Terrorism And Effective Death Penalty Act Of 1996 10

Page No.

II. The Second Circuit Has Interpreted The Term "Properly Filed" Within The Tolling Provision In 28 U.S.C. § 2244(d)(2) In A Way That Is Inconsistent With The Intent Of The Statute And With The Tolling Provision's Underlying Goal To Permit The Exhaustion Of State Court Remedies 15

CONCLUSION 20

APPENDIX ..... infra

TABLE OF AUTHORITIES

Cases

Page No.

Banks v. Horn, 126 F.3d 206 (3d Cir. 1997) 18

Bennett v. Artuz, No. 98-2452, 1999 U.S. App. LEXIS 26814 (2d Cir. Oct. 25, 1999) ..... passim

Coleman v. Thompson, 501 U.S. 722 (1991) 18

Dictado v. Ducharme, No. 98-35531, 1999 U.S. App. LEXIS 20813 (9th Cir. Aug. 26, 1999) 10, 12

Drinkard v. Johnson, 97 F.3d 751 (5th Cir. 1996) 18

Gochicoa v. Johnson, 118 F.3d 440 (5th Cir. 1997) 18

Hoggro v. Boone, 150 F.3d 1223 (10th Cir. 1998) 10, 11

Lovasz v. Vaughn, 134 F.3d 146 (3d Cir. 1998) 10, 11, 18

McCleskey v. Zant, 499 U.S. 466 (1991) 14

McSheffrey v. Angelone, No. 98-6519, U.S. App. LEXIS 2735 (4th Cir. Feb. 23, 1999) 10, 11

Mills v. Norris, 187 F.3d 881 (8th Cir. 1999) 16

Page No.

People v. Bennett, 128 A.D.2d 540, 512 N.Y.S.2d 472 (2d Dept. 1987) 2, 5, 17

People v. Bennett, 69 N.Y.2d 1001, 517 N.Y.S.2d 1034 (1987) 2, 5

People v. Dokes, 79 N.Y.2d 656, 584 N.Y.S.2d 761 (1992) 17

People v. Sandoval, 34 N.Y.2d 371, 357 N.Y.S.2d 849 (1974) 17

Tinker v. Hanks, 172 F.3d 990 (7th Cir. 1999) 10, 12, 18

Villegas v. Johnson, 184 F.3d 467 (5th Cir. 1999) 10, 11

Webster v. Moore, No. 99-4201, 1999 U.S. App. LEXIS 31 (11th Cir. Jan. 4, 2000) 10, 11, 13

Statutes

1996 U.S.C.C.A.N. 924.....16

28 U.S.C. § 1254 3

28 U.S.C. § 2244 .....passim

28 U.S.C. § 2254 .....passim

New York Criminal Procedure Law § 440.10.....passim

Other Authorities

Page No.

H.R. Conf. Rep. No. 104-518 (1996) 16

1 James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice and Procedure § 2.3 (3d ed. 1998) 13

N.Y. Ct. Rules § 670.12 7

Sup. Ct. R. 13 3

Tex. Code Crim. P. art. 11.07 14

NO. __-__

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

CHRISTOPHER ARTUZ, Superintendent,
Greenhaven Correctional Facility,

Petitioner,

v.

TONY BRUCE BENNETT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Christopher Artuz, Superintendent of the Greenhaven Correctional Facility, requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on October 25, 1999, reversing the case and remanding to the district court for further proceedings in accordance with its opinion. The petitioner is represented in this proceeding by the District Attorney of

Queens County, New York, by agreement with the Attorney General of the State of New York.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at No. 98-2452, 1999 U.S. App. LEXIS 26814 (2d Cir. Oct. 25, 1999) (Winter, Kearse, and McLaughlin, JJ.). The decision is reprinted in the appendix of this petition at p. 4a, infra.

The order of the United States District Court for the Eastern District of New York (Gershon, J.) has not been reported. It is reprinted in the appendix at p. 1a, infra.

The decision of the New York State Court of Appeals denying respondent Tony Bruce Bennett's application for leave to appeal to that court from the decision of the Appellate Division, Second Department is reported at 69 N.Y.2d 1001, 517 N.Y.S.2d 1034 (1987). The decision of the Appellate Division, Second Department, unanimously affirming the judgment is reported at 128 A.D.2d 540, 512 N.Y.S.2d 472 (2d Dept. 1987).

JURISDICTION

This petition for a writ of habeas corpus was filed in the Eastern District of New York invoking federal jurisdiction under 28 U.S.C. § 2254. On February 25, 1998, the Eastern District dismissed the petition for a writ of habeas corpus. Pet. App. at 1a.

On October 25, 1999, the Second Circuit entered a judgment and opinion reversing that order and remanding the case to the district court with directions to proceed in

accordance with the opinion of the Second Circuit. Pet. App. at 4a.

This petition for certiorari is filed within ninety days of that date, and is therefore timely. Sup. Ct. R. 13. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2244(d)(2) of Title 28 of the United States Code provides:

> The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(2).

Section 440.10(2) of the New York Criminal Procedure Law provides:

> Notwithstanding the provisions of subdivision one, the court must deny a motion to vacate a judgment when:
>
> (a) The ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment, unless since the time of such appellate determination there has been a retroactively

effective change in the law controlling such issue; or

(b) The judgment is, at the time of the motion, appealable or pending on appeal, and sufficient facts appear on the record with respect to the ground or issue raised upon the motion to permit adequate review thereof upon such an appeal; or

(c) Although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to defendant's unjustifiable failure to take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him;

(d) The ground or issue raised relates solely to the validity of the sentence and not the validity of the conviction.

N.Y. Crim. Proc. Law § 440.10(2).

STATEMENT OF THE CASE

Crime And Trial

On the morning of February 1, 1983, in Queens County, New York, the police pursued Bennett and his co-defendant as they rode in a stolen car. During the pursuit,

Bennett leaned out of the back seat of the car and twice fired his pistol in the direction of the police car, striking it both times in the hood.

At trial, a jury convicted Bennett on March 28, 1984 of two counts of Attempted Murder in the First Degree, Criminal Possession of a Weapon in the Second Degree, two counts of Reckless Endangerment in the First Degree, Criminal Possession of Stolen Property in the First Degree, and Unauthorized Use of a Motor Vehicle.

On September 25, 1984, Bennett was sentenced to concurrent indeterminate prison terms of from fifteen years to life on the attempted murder counts and to lesser terms on the remaining counts, to run concurrently with the greater terms.

Direct Appeal

On direct appeal to the Supreme Court of the State of New York. Appellate Division, Bennett argued, among other things, that the trial court had deprived him of a fair trial by refusing to allow a defense witness to testify.

On March 2, 1987, the Appellate Division unanimously affirmed the judgment of conviction. See People v. Bennett, 128 A.D.2d 540, 512 N.Y.S.2d 472 (2d Dept. 1987).

On March 19, 1987, Bennett sought leave to appeal to the New York State Court of Appeals. On May 7, 1987, that application was denied. See People v. Bennett, 69 N.Y.2d 1001, 517 N.Y.S.2d 1034 (1987).

Post-Conviction Applications

Four years later, on August 16, 1991, Bennett, through privately retained counsel, moved in the state trial court to vacate the judgment pursuant to Section 440.10 of the New York Criminal Procedure Law on grounds of newly discovered evidence and ineffective assistance of counsel. The trial court denied the motion in a written decision dated August 2, 1991.

In June 1995, Bennett, proceeding pro se, moved for a second time to vacate the judgment pursuant to New York Criminal Procedure Law § 440.10. In that motion, Bennett raised three claims: (i) that the trial court's refusal to allow a defense witness to testify at trial deprived him of his right to present witnesses, and of his right to confront witnesses against him; (ii) that the prosecutor's objection to the precluded witness's testimony amounted to prosecutorial misconduct; and (iii) that Bennett's exclusion from a pre-trial hearing to determine which of his past crimes could be used to impeach him if he testified violated his state-law right to be present.

In response, the People argued, among other things, that each of Bennett's claims was subject to a state procedural bar, which precluded the trial court from reviewing the claim on the merits. Specifically, the People argued that Bennett's first two claims were mandatorily barred from review under Section 440.10(2)(a) of the New York Criminal Procedure Law because they had been previously determined on the merits upon a direct appeal from the judgment. The People also argued that Bennett's third claim was mandatorily barred from review under Section 440.10(2)(c) of the New York Criminal Procedure Law because a sufficient record existed that would have

permitted adequate appellate review of that claim had it been raised on direct appeal, which Bennett unjustifiably failed to do. The trial court denied Bennett's motion in an oral decision issued on November 30, 1995.

In the Fall 1996, Bennett sent two letters to the trial court that had considered the motion to request a written order of its denial. New York state law required that Bennett include a written order of the denial in his application for leave to appeal that decision. See N.Y. Ct. Rules § 670.12(b)(2)(vi). The trial court informed him by letter on November 20, 1996, that his motion had been denied pursuant to an oral decision. Bennett subsequently sent several additional letters to the trial court seeking a written order.

Federal District Court Proceedings

On February 11, 1998, Bennett, proceeding pro se, filed a petition in the United States District Court for the Eastern District of New York for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In that petition he raised three claims: (i) that the trial court's preclusion of a defense witness's testimony had deprived him of his right to a fair trial, his right to present witnesses in his defense, and his right to confront witnesses against him; (ii) that his exclusion from a pre-trial evidentiary hearing to determine which of his past crimes could be used to impeach him if he testified had deprived him of his right to due process; and (iii) that he was deprived of his right to effective assistance of counsel because his trial attorney had failed to object to improper remarks made by the prosecutor during summation.

The United States District Court for the Eastern District of New York, asserting jurisdiction under 28 U.S.C.

§ 2254, sua sponte, dismissed the petition as untimely because the petition had exceeded the one-year statute of limitations period contained in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). See 28 U.S.C. § 2244(d)(1).

In its order, the district court did not discuss the tolling provision set forth in 28 U.S.C. § 2244(d)(2).

On May 13, 1998, Bennett requested a Certificate of Appealability from the district court. In that application, he argued that the court had incorrectly dismissed his petition as time-barred because the state court's failure to issue a written order, which had precluded Bennett from obtaining leave to appeal that order, represented an unconstitutional state impediment that prevented him from filing a timely federal habeas petition. See 28 U.S.C. § 2244(d)(1)(B).

The district court issued a certificate of appealability, and on March 25, 1998, Bennett appealed to the United States Court of Appeals for the Second Circuit.

Second Circuit Decision on Appeal

The Second Circuit, in a decision dated October 25, 1999, reversed the district court's determination that the petition was barred by the AEDPA's statute of limitations. The court, addressing an issue not previously raised by Bennett, held, inter alia, that his 1995 state motion to vacate the judgment tolled the AEDPA's statute of limitations under Section 2244(d)(2). The Second Circuit interpreted the term "properly filed" in that provision to include any application for state post-conviction relief that is recognized as such under governing state procedures. See Bennett v. Artuz, No. 98-2452, 1999 U.S. App. LEXIS 26814, at *20 (2d Cir. Oct.

25, 1999). In so holding, the court rejected the argument that a post-conviction application is not "properly filed" if it is filed in a court that has no power to hear the merits of the application. Id. at *16-19.

The court acknowledged a split of authority among the federal circuits on the definition of the term "properly filed." Id. at *16 ("Circuit courts and district courts are split concerning the construction of the phrase.").

Petitioner seeks a writ of certiorari from this Court to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

REASONS FOR GRANTING THE WRIT

Summary of Argument

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes a one-year statute of limitations on state prisoners who wish to obtain habeas corpus review of their state convictions. The statute of limitations contains a tolling provision that suspends the limitations period for "properly filed" state post-conviction motions. It is this provision that has become the main battleground in determining the applicability of the statute of limitations. Indeed, no less than seven circuit courts have interpreted the provision, resulting in a wide split of authority that the circuits themselves have expressly acknowledged.

Moreover, the Second Circuit's broad interpretation of "properly filed" to include post-conviction applications filed in a court not empowered to hear the merits of the application is inconsistent with the purpose of the tolling

provision, which is designed to allow habeas petitioners time to exhaust their state remedies.

This Court has never interpreted the AEDPA's statute of limitations. There is, however, a pressing need for uniformity of application, as prisoners in one circuit will be barred from obtaining federal review while others faced with the same situation in a different circuit will obtain immediate access to such review.

I. There Is A Split Of Authority Among The Circuits Concerning What Constitutes A "Properly Filed" State Post-Conviction Application Sufficient To Toll The Statute Of Limitations Under The Anti-Terrorism And Effective Death Penalty Act Of 1996.

No less than seven circuit courts have spoken on the meaning of the term "properly filed" within the tolling provision set forth in 28 U.S.C. § 2244(d)(2).[1] Yet they have offered varying, indeed irreconcilable, interpretations as to the meaning of this term, which triggers the tolling provision of the AEDPA's statute of limitations. Moreover, the circuit courts themselves have acknowledged the split of authority on this issue as well as the inconsistent results that this split has engendered. Because this case presents an increasingly unsettled issue of law, it is worthy of this Court's review.

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[1] Webster v. Moore, No. 99-4201, 1999 U.S. App. LEXIS 31 (11th Cir. Jan. 4, 2000); Bennett v. Artuz, No. 98-2452, 1999 U.S. App. LEXIS 26814 (2d Cir. Oct. 25, 1999); Villegas v. Johnson, 184 F.3d 467 (5th Cir. 1999); Tinker v. Hanks, 172 F.3d 990 (7th Cir. 1999); Dictado v. Ducharme, No. 98-35531, 1999 U.S. App. LEXIS 20183 (9th Cir. Aug. 26, 1999); Lovasz v. Vaughn, 134 F.3d 146 (3d Cir. 1998); Hoggro v. Boone, 150 F.3d 1223 (10th Cir. 1998). The Fourth Circuit addressed the issue in an unpublished decision. See McSheffrey v. Angelone, No. 98-6519, 1999 U.S. App. LEXIS 2735 (4th Cir. Feb. 23, 1999).

Several circuit courts, influenced by the Third Circuit's decision in Lovasz v. Vaughn, 134 F.3d 146, 148 (3d Cir. 1998), have interpreted "properly filed" to encompass virtually any post-conviction motion or petition. Under this view, a petitioner need not comply with ordinary state procedural rules so long as the petitioner tenders the motion papers in a manner consistent with mere technical requirements concerning time and place of filing. See id. at 148-49; Hoggro v. Boone, 150 F.3d 1223, 1226 n.4 (10th Cir. 1998); Webster v. Moore, No. 99-4201, 1999 U.S. App. LEXIS 31, at *7-9 (11th Cir. Jan. 4, 2000); Villegas v. Johnson, 184 F.3d 467, 470 n.2 (5th Cir. 1999). And petitions that a court has no power to hear on the merits because, for example, they are successive petitions barred from review under state law, would also be "properly filed" under this standard. McSheffrey v. Angelone, No. 98-6519, 1999 U.S. App. LEXIS 2735, at *5 (4th Cir. Feb. 23, 1999). Similarly, claims that are mandatorily procedurally barred from review under state law, or even claims that are jurisdictionally defective in ways not governed by the technical filing requirements, would be "properly filed" and toll the limitations period.[2]

The Ninth Circuit, by contrast, has applied a definition of the term "properly filed" that would exclude petitions that are procedurally barred under state law.

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[2] On the other hand, circuit courts adopting this view have generally held that applications that fail to comply with a state statute of limitations are not "properly filed" and therefore do not toll the statute of limitations under Section 2244 (d)(2). See Moore, No. 99-4201, 1999 U.S. App. LEXIS 31, at *5, 9 (state petition not "properly filed" because procedurally barred by state two-year statute of limitations); Hoggro, 150 F.3d at 1225, 1227 n.5 (appeal of denial of application for post-conviction relief not "properly filed" because appeal was untimely).

Dictado v. Ducharme, No. 98-35531, 1999 U.S. App. LEXIS 20183, at *7 (9th Cir. Aug. 26, 1999). A petition is not properly filed under this standard unless it is "submitted in compliance with the procedural laws of the state in which the application was filed." Id. In arriving at this holding, the court specifically rejected an interpretation of the term that would find as properly filed "any state application that appears on its face to comply with the state's basic procedural rules." Id. Thus, under the Ninth Circuit's standard, a claim that cannot be heard on the merits under state law because it is mandatorily barred from review would not be properly filed and would not toll the statute of limitations.

The Seventh Circuit would exclude still more petitions from the scope of the term "properly filed." The court held that an application for leave to file a state post-conviction application was not "properly filed" even though the application was not procedurally flawed in any way. Tinker v. Hanks, 172 F.3d 990, 991 (7th Cir. 1999). The court reasoned that because the state requires leave of the appellate court to file second or subsequent post-conviction applications in order to "cut down on the paper flow from prisoners," it would serve neither state nor federal law to interpret the term "properly filed" to allow prisoners to mechanically file leave applications merely to extend the AEDPA's statute of limitations. Id.

Finally, the Second Circuit in the case at bar has provided yet another interpretation of the term. The court construed "properly filed application" to mean an "application for post-conviction relief recognized as such [by the state court]." Bennett, No. 2452, 1999 U.S. App. LEXIS 26814, at *20. With no further elaboration on this definition, the court considered as "properly filed" an application that

sought to raise in the trial court claims that, under state law, could only be raised on direct appeal. Even though the trial court had no power whatsoever to treat these on-the-record claims, the Second Circuit declined to give effect to the state mandatory bar. Id. at *15.

As these divergent holdings make clear, there is a conflict among a majority of circuit courts concerning the definition of the term "properly filed" within the AEDPA's tolling provision. Indeed, even the Second Circuit in its decision acknowledged the conflict by stating, "Circuit and district courts are split concerning the construction of the phrase." Id. at *16. And the Eleventh Circuit similarly commented: "Federal courts have begun to struggle with the meaning of the term 'properly filed' . . . and have developed different interpretive approaches." Moore, No. 99-4201, 2000 U.S. App. LEXIS 31, at *5.

This discord is particularly significant for at least three reasons. First, the applicability of the tolling provision is dispositive of a habeas litigant's ability to obtain review in federal court, an issue that has always been of particular concern to this Court. See generally 1 James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice and Procedure § 2.3, at 16-21 (3d ed. 1998). Indeed, unlike many provisions of habeas corpus law, the provision at issue here does not apply to a particular claim raised in the petition, but rather to the petition as a whole. The AEDPA's statute of limitations is a gateway to federal court, and that statute, along with the tolling provision, will be the deciding factor in determining whether a habeas litigant obtains access to the federal courts at all.

Second, the issue is one that recurs with alarming frequency; indeed, it is now at the center of judicial

disagreement concerning the AEDPA's statute of limitations provisions. In a span of less than two years, no less than seven circuit courts have been forced to write on the issue, and district courts in several other circuits have also had to address claims made under the tolling provision. This recurrence is hardly surprising, as state prisoners routinely file multiple post-conviction applications in state courts,[3] just as they have historically done in the federal courts. See McCleskey v. Zant, 499 U.S. 466, 470 (1991). These applications for post-conviction relief frequently encompass large blocks of time that may or may not be excluded under the tolling provision. The tolling provision thus comes into play in many cases, and is routinely invoked to avoid the effects of the AEDPA's one-year statute of limitations.

Third, the practical outcome of the division is that similarly positioned habeas litigants in different jurisdictions will receive unequal access to the writ. A litigant who fails to comply with a mandatory provision of state law in one circuit will not be able to obtain any review of his federal claims, while a similarly situated litigant in a different circuit will have immediate access. This difference in treatment cannot be justified.

Thus, there exists an acute need for this Court to resolve the question of what constitutes a "properly filed" post-conviction application. It is a determination that will resolve inequities in the treatment of habeas petitioners and that will have almost daily application in the lower federal courts.

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[3]Indeed, this problem has been so serious at to cause many states to enact severe limitations on successive petitions, much as Congress did in the AEDPA. See, e.g., Tex. Code Crim. P. art. 11.07, § 4.

II. The Second Circuit Has Interpreted The Term "Properly Filed" Within The Tolling Provision Set Forth In 28 U.S.C. § 2244(d)(2) In A Way That Is Inconsistent With The Intent Of The Statute And With The Tolling Provision's Underlying Goal To Permit The Exhaustion Of State Court Remedies.

The Second Circuit has interpreted the term "properly filed application" within the AEDPA's tolling provision to mean "an application for state post-conviction relief recognized as such under governing state procedures . . . ." Bennett, No. 98-2452, 1999 U.S. App. LEXIS 26814, at *20. But, to the extent that any rational interpretation can be placed on this language, it is far too inclusive, encompassing not only applications that the state court has no power to review, but apparently almost any piece of paper that can be "recognized" as a post-conviction motion, regardless of compliance with state law. More importantly, such a broad interpretation of "properly filed" is inconsistent with the purpose of the tolling provision, which is designed to allow a habeas petitioner time to exhaust his state remedies, because it includes applications that cannot possibly serve that goal.

Preliminarily, the Second Circuit's formulation is not susceptible to easy interpretation. While it appears to demand some adherence to "governing state procedures," it does not specify which procedures require such compliance. And although the court's terminology is all-inclusive, such an interpretation would be inconsistent with the final disposition in the case at bar. Indeed, the Second Circuit found that Bennett's post-conviction application, which was procedurally barred from review under New York state law, was nonetheless a "properly filed application" under "governing state procedures."

The apparent intended interpretation of this language is that a post-conviction application is properly filed if it is merely "recognized" or identified as a post-conviction application by the state court receiving it. In other words, any papers filed by a state prisoner in state court trigger the tolling provision unless the clerk cannot even recognize them as a post-conviction application, and either rejects them outright or forwards them to some other body or agency. But this interpretation is equally problematic, because it encompasses far too many applications for collateral review and lends itself to an arbitrary and, hence, inconsistent application of the tolling provision. This standard will often place dispositive weight on the ministerial determinations of a court clerk who decides whether to reject or calendar an application. Congress could not have intended the application of the AEDPA's only tolling provision to turn on such a potentially unreasoned and arbitrary decision.

In addition, the Second Circuit's interpretation of "properly filed" does nothing the further the goal of exhaustion, which underlies the AEDPA's tolling provision. This provision, which suspends the statute of limitations while a state prisoner pursues his claims in state court, serves the AEDPA's policy goal to "provide[] for the exhaustion of state remedies and require[] deference to the determinations of state courts." H.R. Conf. Rep. No. 104-518, at 111 (1996), reprinted in 1996 U.S.C.C.A.N. 924, 944. See also Mills v. Norris, 187 F.3d 881, 883-84 (8th Cir. 1999) (noting that "the tolling period in § 2244(d)(2) complements [the exhaustion requirement under 28 U.S.C. § 2254(c)] by extending the time for filing federal petitions while state remedies are being exhausted"). The Second Circuit's interpretation of the term "properly filed application" to include claims raised in a court not empowered to hear them in no way furthers the goal of exhaustion.

The Second Circuit found that Bennett's motion to vacate judgment was a "properly filed application" even though it raised claims that were mandatorily procedurally barred under New York state law. Section 440.10(2)(a) of the New York Criminal Procedure Law precludes a trial court from reviewing a claim that was previously determined on the merits upon a direct appeal. And Section 440.10(2)(c) prohibits the trial court from reviewing a claim for which there is a sufficient basis in the record to have permitted adequate review of the claim on direct appeal, but the defendant unjustifiably failed to raise the issue on direct appeal. Of the claims raised by Bennett both in his motion to vacate judgment and in his habeas petition all were on-the-record claims, which the trial court had no power to review on the merits.[4] Thus, the filing of this application in no way assisted Bennett in exhausting his state claims. Nonetheless, the Second Circuit found that the motion was indeed a "properly filed" and that, as a result, Bennett should benefit from the tolling provision.

Not only is the Second Circuit's decision at odds with the exhaustion requirement, but it also violates federal principles of comity that underlie the requirement. One of the central purposes of the AEDPA was to "'reduce federal intrusion into state criminal proceedings,'" Lovasz, 134 F.3d at 148 (quoting Banks v. Horn, 126 F.3d 206, 211 (3d Cir. 1997)), and accord greater deference to state court

[4]Petitioner's claim that the trial court had erroneously precluded a defense witness from testifying at trial already had been raised and decided on direct review. See People v. Bennett, 128 A.D.2d 540, 512 N.Y.S.2d 472 (2d Dept. 1987). Petitioner's claim that he had been excluded from a hearing in violation of People v. Sandoval, 34 N.Y.2d 371, 357 N.Y.S.2d 849 (1974), and People v. Dokes, 79 N.Y.2d 656, 584 N.Y.S.2d 761 (1992), was an on-the-record claim that could have been raised on direct appeal, but was not.

adjudications. See 28 U.S.C. §§ 2254 (d)(1)-(2), (e)(1). See also Gochicoa v. Johnson, 118 F.3d 440, 444 (5th Cir. 1997); Drinkard v. Johnson, 97 F.3d 751, 767-69 (5th Cir. 1996). Yet the Second Circuit's holding is not in keeping with this statutory purpose. Indeed, it runs counter to it. By deeming a motion that is procedurally barred from judicial review under state law as "properly filed," the Second Circuit pays no deference to the state court's determination that it has no power to review that claim.

Moreover, the Second Circuit's reluctance to interpret the tolling provision to require a procedurally viable post-conviction application is unwarranted. See Bennett, No. 98-2452, 1999 U.S. App. LEXIS 26814, at *19. Indeed, such a requirement would carry out the provision's purpose of facilitating the exhaustion of state-court remedies. Nor would such an inquiry into state procedural rules be an inappropriate role for the federal courts, as those courts routinely interpret state court procedural requirements in determining whether claims that are unexhausted can be returned to state court. See Coleman v. Thompson, 501 U.S. 722, 750 (1991).

Finally, the Second Circuit's interpretation of the tolling provision undermines the purposes of the limitations period because it allows prisoners to file endless state applications that do nothing to further exhaust their claims. See Tinker, 172 F.3d at 991. The illogical result of the Second Circuit's holding is that the statute of limitations could be tolled indefinitely by the petitioner whose post-conviction motion papers are merely accepted by the clerk of the court even though the motion may do nothing to exhaust that petitioner's state court remedies.

Thus, the Second Circuit's construction of the phrase "properly filed" to include applications filed by a prisoner in a state court that has no power to review them on the merits in no way furthers the purposes of exhaustion, comity, or the statute of limitations. The court's construction, moreover, effectively places in the hands of the court clerk who initially receives the application the ultimate determination of whether a post-conviction application is properly filed. Congress surely could not have intended such an arbitrary and inconsistent application of the tolling provision, resulting in similarly situated prisoners receiving unequal access to the writ.

CONCLUSION

For the aforementioned reasons, Petitioner, Christopher Artuz, respectfully requests this Court to find that: (1) there is an irreconcilable split among a majority of the circuit courts concerning the meaning of the term "properly filed" within the tolling provision of the AEDPA's statute of limitations so as to warrant the granting of Certiorari, and (2) the Second Circuit's interpretation of the term "properly filed" conflicts with the intent of the statute and with the tolling provision's underlying goal to permit the exhaustion of state court remedies.

Respectfully submitted,

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District Attorney, Queens County

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January 24, 2000

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TONY BRUCE BENNETT,	:	
	:	
Petitioner,	:	98-CV-1274
	:	ORDER
v.	:	
	:	
CHRISTOPHER ARTUZ, Superintendent, Greenhaven Correctional Facility,	:	
	:	
Respondent.	:	

GERSHON, United States District Judge:

Petitioner Tony Bruce Bennett has petitioned the court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. I have determined that the petition is untimely and should be summarily dismissed.

The petitioner was convicted in New York Supreme Court, Queens County, on March 28, 1984, of various counts of attempted murder, criminal possession of a weapon, reckless endangerment, criminal possession of stolen property and unauthorized use of a vehicle. His conviction was affirmed by the Appellate Division, Second Department, on March 2, 1987. People v. Bennett, 128 A.D.2d 540 (1987). Leave to appeal was denied by the New York Court of Appeals on May 2, 1987. People v. Bennett, 69 N.Y.2d 1001 (1987). The petitioner did not seek a writ of certiorari to the United States Supreme Court. The petitioner has also twice moved in Supreme Court, Queens County, to vacate his conviction. The first of these motions was denied on August

2, 1991 and the second was denied on a date that the petitioner is not able to specify. The instant petition is dated February 11, 1998.

On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The AEDPA, among other things, amended 28 U.S.C. § 2244 to provide a one-year limitations period for filing state habeas corpus petitions. The one-year limitations period runs from the latest to occur of certain events, the only relevant one of which, in this case, is the "date on which the judgment [of conviction] became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). The running of the limitations period is tolled for the time during which a "properly filed application" for collateral review is pending in state court. 28 U.S.C. § 2244(d)(2).

The one-year limitations period does not apply in case, where as here, the judgment of conviction became final before April 24, 1996, the effective date of AEDPA. In these circumstances, the Court of Appeals for the Second Circuit has held that "a habeas petitioner is entitled to a reasonable time after the effective date of the AEDPA to file a petition." Peterson v. Demskie, 107 F.3d 92, 92 (2d Cir. 1997). Although the court did not define what constitutes a "reasonable time," it explained that, when a prisoner has had "several years to contemplate bringing a federal habeas corpus petition, we see no need to accord a full year after the effective date of the AEDPA." Id. at 93. Nevertheless, it also cautioned that the "reasonable time" period should not be applied with "undue vigor." Id. The court concluded that a petition filed seventy-two days after the effective date of the AEDPA, where the conviction became final in 1978, was timely. Id.

Here, the petitioner filed his petition on February 11, 1998,[1] one year and nine and one-half months after the effective date of the AEDPA and more than ten years after his conviction became final.[2] The petition does not set forth any reason for this delay. In addition, even though the petitioner has filed two motions to vacate his convictions, he has had several years to contemplate bringing the instant petition. Upon these facts, the instant petition is clearly untimely under Peterson.

CONCLUSION

The petition is DISMISSED.

SO ORDERED.

s/Nina Gershon
Nina Gershon
United States District Judge

Dated: February 25, 1998
Brooklyn, New York

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[1] Where a petitioner is proceeding pro se, the prisoner is deemed to have filed a document when it is delivered to a prison authority for forwarding to clerk of the court. See Houston v. Lack, 487 U.S. 266 (1988). Here, the petition was dated February 11, 1998, and was filed at the Clerk's Office on February 20, 1998. Although there is no evidence that the petition was actually delivered on that date, the petition will be treated as being filed on February 11, 1998.

[2] Petitioner's conviction became final on August 2, 1987, ninety days after the New York Court of Appeals denied his request for leave to appeal, which was the last date on which he could have petitioned the United States Supreme Court for a writ of certiorari. See Caspari v. Bohlen, 510 U.S. 383 (1994); Supreme Court Rule 13.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1999

(Argued: September 24, 1999 Decided: October 25, 1999)
Final brief submitted September 29, 1999

Docket No. 98-2452

TONY BRUCE BENNETT,

Petitioner-Appellant,

– v. –

CHRISTOPHER ARTUZ, Superintendent,

Respondent-Appellee.

Before:

WINTER, Chief Judge,
KEARSE, and MCLAUGHLIN, Circuit Judges.

Appeal from a sua sponte order by the United States District Court for the Eastern District of New York (Nina

Gershon, Judge) dismissing a petition for habeas corpus relief as untimely. We reverse and remand.

ELLEN B. RESNICK, Law Offices of Alan S. Futerfas, New York, New York, for *Petitioner-Appellant*

KATHLEEN O'LEARY, Assistant District Attorney, Queens County (Richard A. Brown, District Attorney, Queens County, John M. Castellano, Assistant District Attorney, Queens County, of counsel), Kew Gardens, New York, for *Respondent-Appellee*.

WINTER, Chief Judge:

Tony Bruce Bennett appeals from Judge Gershon's sua sponte dismissal of his habeas corpus petition pursuant to 28 U.S.C. § 2254 as untimely. The district court concluded that the petition was time-barred based on the fact that the petition was filed more than twenty-one months after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), and on our decision in Peterson v. Demskie, 107 F.3d 92 (2d Cir. 1997), holding that prisoners whose convictions became final prior to the AEDPA's enactment have only a "reasonable time" after the enactment to bring federal habeas petitions. For the reasons set forth below, we reverse and remand.

Following a 1984 jury trial in New York Supreme Court, Queens County, appellant was convicted of two counts of attempted murder in the first degree, criminal possession of a weapon in the second degree, two counts of reckless endangerment in the first degree, criminal possession of stolen property in the first degree, and unauthorized use of a motor vehicle. The evidence introduced at trial established, among other things, that appellant fired two bullets at a police car during a car chase. The Appellate Division, Second Department, affirmed the conviction in a decision dated March 2, 1987. See People v. Bennett, 512 N.Y.S.2d 472 (App. Div. 1987). Leave to appeal the decision to New York's Court of Appeals was thereafter denied. See People v. Bennett, 511 N.E.2d 93 (N.Y. 1987) (table).

In May 1991, appellant moved to vacate the judgment of conviction pursuant to N.Y. Crim. Proc. Law ("CPL") § 440.10 on the grounds of newly discovered evidence and ineffective assistance of counsel. The motion was denied in an August 1991 order. In June 1995, appellant moved pro se to vacate the judgment of conviction pursuant to CPL § 440.10 (the "1995 Motion"). The 1995 Motion asserted that the trial court denied appellant the right: to be present at the Sandoval hearing and at other critical stages of trial, and to offer certain testimony at trial. Appellee maintains that the 1995 Motion was denied "by the state court in an oral decision on November 30, 1995," in a ruling "without any conclusions of law or fact." Appellant represents that he never received a copy of an order denying the 1995 Motion despite having written numerous letters to the state court requesting information on the disposition of the motion and requesting a written copy of the disposition. For purposes of this appeal, we view the record in the light most favorable to appellant and accept his representation that service of a

written order never occurred. On remand, of course, this will be a factual issue to be resolved.

On February 11, 1998, appellant filed the instant petition. He alleged in the petition violations of his constitutional rights: (i) to present witnesses in his defense and to a fair trial; (ii) to be present at all material stages of the trial; and (iii) to the effective assistance of counsel. The district court dismissed the petition sua sponte as time-barred but granted appellant's motion for a certificate of appealability ("COA"). When the district court dismissed the petition, however, appellant's representations concerning the 1995 Motion was not before it. These came to light only when appellant moved the district for a COA.

In determining whether the petition was properly dismissed, we address three issues: (i) whether the AEDPA's pending-state-petition tolling provision, 28 U.S.C. § 2244(d)(2), applies because appellant's conviction became final prior to the AEDPA's enactment; (ii) if that tolling provision applies, whether the 1995 Motion was "pending" within the meaning of that provision; and (iii) if that tolling provision applies, whether appellant's 1995 Motion was "properly filed" within the meaning of that provision.

a) Applicable Limitations Period and the AEDPA's Tolling Provision

Prior to the enactment of the AEDPA, there was no formal limit on the time for filing a habeas corpus petition pursuant to 28 U.S.C. § 2254. Delayed filing of a petition was a basis for dismissal only if the appellant knew or could have known the grounds for the petition earlier and if the state demonstrated "that the delay prejudiced [it] in its ability to respond to the petition." Ross v. Artuz, 150 F.3d 97, 99

(2d Cir. 1998) (alteration in original) (internal quotations and citation omitted). The AEDPA changed this by imposing a one-year limitations period on habeas petitions that begins to run from the latest of several events, including the date on which the challenged state judgment becomes final. See generally 28 U.S.C. § 2244(d)(1).

The AEDPA's one-year limitations period does not strictly apply to the instant petition because appellant's conviction became final prior to the AEDPA's enactment. See Reyes v. Keane, 90 F.3d 676, 678-79 (2d Cir. 1996) (holding that the AEDPA's one-year limitations period does not apply retroactively); overruled on other grounds by Lindh v. Murphy, 521 U.S. 320, 336-37 (1997) (holding that the AEDPA provisions for noncapital cases "generally apply only to cases filed after [the AEDPA] became effective"). However, we have held that prisoners whose habeas claims accrued prior to the AEDPA's enactment were afforded the "reasonable time" of "one year after the effective date of the AEDPA" to file a federal habeas petition. Ross, 150 F.3d at 102-03. That one-year grace period expired April 24, 1997, over nine months before the instant petition was filed.

However, the AEDPA provides that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation." 28 U.S.C. § 2244(d)(2). By not counting the time during which a petition is pending in state court, the tolling provision preserves the "long-standing federal policy" of requiring habeas appellants to exhaust state court remedies prior to initiating suit in federal court. Mills v. Norris, 187 F.3d 81, 83-84 (8th Cir. 1999) (noting that "[t]he tolling period in § 2244(d)(2) complements [the exhaustion requirement under 28 U.S.C. §

2254(c)] by extending the time for filing federal petitions while state remedies are being exhausted); see also O'Sullivan v. Boerckel, 119 S.Ct. 1728, 1732 (1999) (noting that exhaustion doctrine is based upon the understanding that "state courts should have the first opportunity to review [an unlawful confinement] claim and provide any necessary relief").

We have not yet considered whether the pending-state-petition tolling provisions extends the one-year grace period established in Ross. Several other circuit courts have considered the issue, however, and have held that the tolling provision applies to petitions challenging pre-AEDPA convictions. See Gaskins v. Duval, 183 F.3d 8, 10 (1st Cir. 1999); Fields v. Johnson, 159 F.3d 914, 916 (5th Cir. 1998) (per curiam); Gendron v. United States, 154 F.3d 672, 675 (7th Cir. 1998) (per curiam) (resolving consolidated cases), cert. denied 119 S. Ct. 1758 (1999); Hoggro v. Boone, 150 F.3d 1223, 1226 (10th Cir. 1998); Lovasz v. Vaughn, 134 F.3d 146, 149 (3d Cir. 1998); see also Mills, 1999 WL 637077, at *1-2 (applying § 2244(d) tolling provision to habeas petition challenging pre-AEDPA conviction without discussing propriety of doing so); Guenther v. Holt, 173 F.3d 1328, 1331 (11th Cir. 1999) (same). We agree with these circuits and hold that the AEDPA's pending-state-petition tolling provision does apply to a petition challenging a pre-AEDPA conviction. To hold otherwise would effectively discourage appellants from starting and completing the state-court review process.

b) "Pending" Motion Under 28 U.S.C. § 2244(d)(2)

We further conclude that the 1995 Motion was still "pending" before the New York courts in February 1998, for purposes of 28 U.S.C. § 2244(d)(2), when appellant filed the

instant petition. Accordingly, the limitations period in which appellant had to file his habeas petition was tolled.[3]

The AEDPA's tolling provision complements the 28 U.S.C. § 2254(c) exhaustion requirements by tolling the limitations period on federal habeas petitions while an appellant pursues state-court remedies. See Mills, 187 F.3d 883-84. When Congress enacted the AEDPA, one of its policy goals was to "provide[] for the exhaustion of state remedies and require[] deference to the determination of state courts." H.R. Conf. Rep. No. 104-518, at 111 (1996), reprinted in 1996 U.S.C.C.A.N. 924, 944. Indeed, "[t]olling the federal statute of limitations while the state prisoner is properly adhering to exhaustion requirements reinforces the orderly presentation of claims to the appropriate state tribunals and obviates the need for federal action." Nino v. Galaza, 183 F.3d 1003, 1005 (9th Cir. 1999). If we were to hold that a post-conviction petition is not pending before state courts during the intervals between disposition and appeal, we would force appellants into federal court prematurely, before "giving] . . . state courts [a] full opportunity to resolve any constitutional issues." O'Sullivan, 199 S. Ct. at 1732. We therefore hold that a state-court petition is "pending" from the time it is first filed until finally disposed of and further appellate review is unavailable under the particular state's procedures. Having determined the circumstances during which a state-court petition may be considered "pending," we now address whether appellant's 1995 Motion falls within those circumstances.

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[3] We note that the issue before us does not involve the need for appellant to exhaust state remedies. We decide only that the pending-state-petition tolling provision applies to appellant's 1995 motion, whether or not its filing was a prerequisite to a subsequent federal petition.

The 1995 Motion was a motion to vacate judgment pursuant to CPL § 440.10. Under CPL § 450.15, a movant may appeal the denial of a § 440.10 motion to vacate judgment "provided that a certificate granting leave to appeal is issued pursuant to [CPL §] 460.15." And, under the rules of the Second Department, a certificate for leave to appeal must be made in writing within thirty days of service of the adverse order. These rules state, in relevant part, that:

> (1) An application pursuant to . . . CPL 460.15 for leave to appeal to this court from an order shall be made in writing within 30 days after service of the order upon the applicant . . . .
>
> (2) The application . . . shall include . . . (vi) a copy of the order sought to be reviewed and a copy of the decision of the court of original instance or a statement that there was no decision.

N.Y. Ct. Rules § 670.12(b)(1) & (b)(2)(vi) (emphasis added); see also CPL § 460.10(4) ("An appeal by a defendant to an intermediate appellate court by permission, pursuant to [CPL §] 450.15, is taken" by applying for a § 460.15 certificate "(a) [within thirty days after service upon the defendant of a copy of the order sought to be appealed . . . ." (emphasis added)).

Appellees argue that appellant's motion was no longer pending by the end of 1996, when he learned of the oral denial of the motion and neither filed an application for leave to appeal nor sought a writ of mandamus pursuant to Article 78 to compel the state court to issue an appealable order. However, we conclude that the 1995 Motion was an is still "pending" in the New York courts for purposes of the AEDPA tolling provision. If Appellant was never served

with a copy of the order denying the 1995 Motion, he could not apply for a certificate for leave to appeal because the thirty-day period for applying for the certificate has not yet commenced. See People v. Washington, 657 N.E.2d 497, 498 (N.Y. 1995) (holding that "service by the prevailing party is necessary under CPL 460.10 in order to commence the time period for the other party to take an appeal"). Moreover, appellant allegedly wrote numerous letters to the state court concerning the 1995 Motion so that he could pursue the matter. The state court, however, allegedly failed to respond appropriately to appellant's requests. We also reject appellees' contention that the pending-state-petition tolling period does not apply because appellant did not file a petition for a writ of mandamus under Article 78. In our view, it is not a petitioner's burden to cause state courts to act expeditiously to avoid a time bar claim raised by the state itself. See O'Sullivan, 119 S. Ct. at 1732 ("[S]tate prisoners do not have to invoke extraordinary remedies when those remedies are alternatives to the standard review process . . . .")

Thus, we hold that the time for appealing the New York Supreme Court's denial of the 1995 Motion has not yet expired. See Mills, 187 F.3d at 884 (holding that state post-conviction motion was "pending" until expiration of ninety-day period appellant had to file a transcript to perfect state-court appeal); Taylor v. Lee, 186 F.3d 557, 561 (4th Cir. 1999) (holding that "under § 2244(d)(2) the entire period of state post-conviction proceedings, from initial filing to final disposition by the highest state court . . . is tolled from the limitations period"); Nino, 183 F.3d at 1004 (holding that "the time tolled for exhaustion of state remedies pursuant to 28 U.S.C. § 2244(d) includes the interval between the disposition of . . . [a] post-conviction petition and the filing of an appeal . . . at the next state appellate level"); Guenther,

173 F.3d at 1331 (holding that state-court proceeding was "pending" from time appeal was filed until Alabama's Supreme Court denied discretionary review); Barnett v. Lemaster, 167 F.3d 1321, 1323 (10th Cir. 1999) (holding that term "pending" must be construed "to encompass all of the time during which a state prisoner is attempting, through proper user of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application").

Accordingly, appellant's federal habeas petition is not untimely because, if his representations are true, the one-year grace period he has to file his petition under Ross has not yet commenced.[4]

c) "Properly Filed" Under 28 U.S.C. § 2244(d)(2).

Appellee also argue that appellant's 1995 Motion was not "properly filed" because "he did not bring the on-the-record claims raised in that motion in a court that was empowered to review them on the merits." Appellee contends that claims in the 1995 Motion were "subject to a mandatory procedural l bar under state law" because one of the claims had already been decided on direct review and the

[4] We need not determine whether any of the claims asserted in the petition are viable. Appellant's ineffective assistance of counsel claim may be untimely despite AEDPA's tolling provision. Indeed, that claim was rejected by the state court in 1991, and appellant did not file a petition for relief as to that claim by April 24, 1997. Nevertheless, the 1995 Motion was pending as of April 24, 1997 and it is possible that, in accordance with Rose v. Lundy, 455 U.S. 509 (1982), appellant was attempting to exhaust administrative state remedies on all his claims prior to filing a federal petition for relief. Whether the 1995 Motion tolled the statute of limitations for the ineffective assistance of counsel claim is, therefore, to be determined by the district court on remand.

other claim "had a sufficient record basis for direct review."[5] Again, we disagree.

"Neither the AEDPA nor its legislative history explains which state filings quality as properly filed applications." Villegas v. Johnson, 184 F.3d 467, 470 (5th Cir. 1999) (citing relevant legislative history). Circuit and district courts are split concerning the construction of the phrase. "The majority of courts that have considered this issue have concluded that '"a properly filed application" is one submitted according to the state's procedural requirements, such as the rules governing notice and the time and place of filing.'" Villegas, 184 F.3d at 469-79 (quoting Lovasz v. Vaughn, 134 F.3d 146, 148 (3d Cir. 1998) and collecting cases). A minority of courts, however, have

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[5] To support the argument, appellee cites CPL §§ 440.10(2)(a) & (c) providing that:

> Notwithstanding the provisions of subdivision one [permitting a motion to vacate at any time after entry of judgment], the court must deny a motion to vacate a judgment when:
>
> > (a) The ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue; or . . .
> >
> > (c) Although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him . . . .
>
> CPL § 440.10(2).

construed "properly filed" more broadly, and have held that federal petitioners whose pending state court applications are barred under state successive post-conviction provisions are not "properly filed." See Dictado v. Ducharme, __F.3d__, No. 98-35531, 1999 WL 646953, at *2 (9th Cir. Aug. 26, 1999) (holding that "properly filed" means an "application submitted in compliance with the procedural laws of the state in which the application was filed" such that application rejected by the state's highest court because it was procedurally barred is not properly filed under the AEDPA's tolling provision) (emphasis added); Tinker v. Hanks, 172 F.3d 990, 991 (7th Cir. 1999) (holding that application for permission required to file successive petition under state law did not constitute properly filed application because "Congress could not have intended that the time for filing the federal action be tolled indefinitely by the simple expedient of filing repeated applications for leave to file state postconviction proceedings").

Appellee urges us to take the broader view of the term "properly filed" as discussed by the Dictado court and some district courts in this circuit. See Hill v. Keane, 984 F. Supp. 157, 158-59 (E.D.N.Y. 1997) (holding that state petition for collateral relief was not properly filed because it relied solely on record facts and defendant is "procedurally barred from moving to vacate a judgment of conviction under [CPL] § 440.10(1) when he could have raised his claims on direct appeal"); Valentine v. Senkowski, 966 F. Supp. 239, 241 (S.D.N.Y. 1997) (assuming that post-conviction application, "although always timely, must also be non-frivolous in order to be 'properly filed'"); but see e.g., Hughes v. Irvin, 967 F. Supp. 775, 778-79 (E.D.N.Y. 1997) (rejecting proposition "that a seemingly frivolous collateral attack [under CPL § 440] is not 'properly filed' for purposes of tolling the one-year statute of limitations"). We decline to do so.

Determining whether a pending-state-court motion is procedurally barred under a state law such as CPL §§ 440.10(2) is beyond the appropriate role of a federal court in addressing whether a state post-conviction application was "properly filed." It would involve federal courts in making determination as to the proper outcome of pending state proceedings based on state law when a state court is positioned to make the very same decision. Moreover, these issues are often not clear-cut. For example, determining whether a state court motion is procedurally barred because a defendant did not raise the issue on direct appeal would require that we ascertain whether "sufficient facts appear on the record of the proceedings" as well as determine whether a defendant's failure to bring the claim constitutes "unjustifiable failure." CPL § 440.10(2)(c).

Like the Fifth and Third Circuits, "we are reluctant to engraft a merit requirement into § 2244(d)(2) without some indication of congressional intent to do so." Villegas, 184 F.3d at 470. Section 2244(d)(2) requires only that a state application be "properly filed." Had Congress "intended to condition tolling on a state court finding of merit, it could have drafted § 2244(d)(2) to exclude frivolous petitions . . . [and to] clearly with[o]ld tolling from prisoners filing . . . procedurally barred claims." Villegas, 184 F.3d at 470. As the Villegas court observed, "Congress enacted the AEDPA against a backdrop of federal habeas law dealing with procedurally barred claims." Id. (citing Coleman v. Thompson, 501 U.S. 722, 750 (1991)). Indeed, Congress addressed the problems associated with successive federal habeas petitions by severely restricting a prisoner's ability to file more than one federal habeas petition. See 28 U.S.C. §§ 2244(a) & (b).

Nor are we persuaded, as appellees maintain, that construing "properly filed" narrowly will "invit[e] a 'paper flow' by state prisoners trying to extend the time in which they can file a habeas corpus petition indefinitely." As the Villegas court observed, and we agree:

> [I]n nearly every case, the tolling will last only as long as the state court takes to resolve the pending application because any lapse of time before a state application is properly filed will be counted against the one-year limitations period. Thus, a prisoner will not be able to revive an expired limitation period by simply filing a state petition in conformity with the basic procedural requirements. Furthermore, the potential for delay may decline as states place stricter restrictions on the filings that are the basis of tolling.

Villegas, 184 F.3d at 472-73 (citation omitted). We would add only that prisoners serving jail time usually have little incentive to delay determination of their habeas petitions.

We therefore construe "properly filed" to mean simply that an application for state post-conviction relief recognized as such under governing state procedures has been filed. Appellant's 1995 Motion qualifies under that standard. Accordingly, appellant's federal habeas petition is not untimely because the 1995 Motion was "properly filed."

We therefore reverse and remand for further proceedings.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

___AD2D_____ Submitted - January 22, 1987

WILLIAM C. THOMPSON, J.P.
JAMES F. NIEHOFF
MOSES M. WEINSTEIN
GERALDINE T. EIBER, JJ.

2754 E

The People, etc., respondent, v. Tony Bennett, appellant. (Ind. No. 842/93)

DECISION AND ORDER

Donald E. Gilbert, New York, N.Y., for appellant.

John J. Santucci, District Attorney, Kew Gardens, N.Y. (Seymour Roth of counsel) for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Friedmann, J.), rendered September 25, 1984, convicting him of attempted murder in the first degree (two counts), criminal possession of a weapon in the second degree, reckless endangerment in the first degree (two counts), criminal possession of stolen property in the first degree and unauthorized use of a motor vehicle, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

Upon the exercise of our factual review power we are satisfied that the evidence was of sufficient quantity and quality to establish the defendant's guilt beyond a reasonable doubt. The two police officer victims separately identified the defendant in a lineup and such identifications by police officers, who are trained to carefully view and identify suspects, are entitled to great weight (see People v. Morales, 37 N.Y.2d 262).

Further, while the court erred in precluding the defendant from calling a defense witness, Mr. Mahamed, who would have testified that he had spoken with the defendant and his alibi witness approximately one hour after the commission of the crime, this error does not warrant reversal. The defendant had testified that he was at his friend's house at the time the crime was committed and had joined the crowd that appeared near the scene of the crime when shots were heard. His friend corroborated this account. The defendant further testified that he had spoken to Mr. Mahamed, his neighbor, near the scene and had inquired as to what was happening. As Mahamed's testimony would not have accounted for the defendant's whereabouts during the crime or placed him away from the crime scene shortly thereafter (see People v. Cuevas, 67 A.D.2d 219), he was not an alibi witness (C.P.L. § 250.20). Thus, the defendant was not required to include his name in his notice of alibi and he should have been permitted to call him as a witness. However, in light of the overwhelming evidence of guilt, this testimony concerning the defendant's presence near the scene of the crime approximately one hour after its commission was harmless beyond a reasonable doubt (see People v. Crimmins, 36 N.Y.2d 230).

We have examined the defendant's remaining contentions and find them to be without merit.

THOMPSON, J.P., NIEHOFF, WEINSTEIN, and EIBER, JJ., concur.

ENTER:

MARTIN H. BROWNSTEIN
Clerk